

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 99-153
READING BROADCASTING, INC.)	File No. BRCT-940407KF
)	
For Renewal of License of)	
Station WTVE(TV), Channel 51)	
Reading, Pennsylvania)	
)	
and)	
)	
ADAMS COMMUNICATIONS CORPORATION)	File No. BPCT-940630KG
)	
For Construction Permit for a New)	
Television Station to Operate on)	
Channel 51, Reading, Pennsylvania)	

To: Magalie Roman Salas, Secretary
for direction to
The Honorable Richard L. Sippel
Administrative Law Judge

ADAMS' REPLY TO OPPOSITION TO ITS
MOTION TO PRESENT REBUTTAL TESTIMONY

1. The opposition filed by Reading Broadcasting, Inc. ("RBI") to the motion to present rebuttal testimony filed by Adams Communications Corporation ("Adams") contains legal and factual arguments for which a reply should be entertained in order to join the issues for decision by this Court.¹

Legal arguments

2. Adams' motion cited a straight-forward Commission decision holding that a party to a comparative broadcast hearing proceeding is entitled to offer rebuttal evidence addressed to its opponent's direct case, including matters elicited in the rebuttal proponent's cross examination of the opponent's

¹ An accompanying motion for leave to file this reply is filed on this date.

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witnesses. WVCO, Inc., 67 R.R.2d 1663 (1990). Adams also cited authorities in the federal and state civil courts. RBI does not respond to, attempt to distinguish, or even mention any of this legal precedent. Rather, it cites three Commission cases which are inapposite.

3. A copy of the order in Kimler Broadcasting, Inc., FCC 99-221, released August 17, 1999, opposition at 2, is attached for handy reference.² The issue was the accuracy of a statement by Mr. Cilurzo, the former general manager of a noncommercial FM radio station, that the station did not go off the air until after he resigned and left the station. At the hearing, there was testimony by Mr. Cilurzo, by members of the board of directors of the licensee and by a representative of the power company regarding the date of cessation of service in relation to the date of Mr. Cilurzo's departure. 8 FCC Rcd. at 4838-40 (¶¶54-84), 4844-45 ¶¶127-131). This evidence included direct testimony, cross examination, rebuttal testimony and surrebuttal testimony. Id. Judge Frysiak denied an effort -- after the close of the record --- to offer additional surrebuttal testimony of one of the witnesses, who had given written direct testimony and could have been called as a rebuttal witness during the three-day period of rebuttal proofs. Id.; Kimler order at 4. This ruling was upheld in the cited order.

² The order refers to a decision by Judge Frysiak, Frank K. Spain, 8 FCC Rcd. 4831 (1993) and at page 4, n. 8, cites to ¶158 of that decision. The correct reference is ¶128, 8 FCC Rcd. at 4844.

4. Meredith Corporation, 4 FCC Rcd. 2666 (Rev.Bd. 1989), opposition at 2, involved an issue regarding whether a small community could support a new television station. The determination governed whether an application for construction and use of the full power station as a total satellite of a nearby major market television station would be granted or denied. The applicant offered expert economic testimony that independent operation of the proposed satellite could not be sustained; a competitor television station that had intervened in the case offered expert economic testimony that such independent operation could be sustained. Both experts gave testimony and were subject to cross examination over several hearing days. Thereafter, one of the parties sought to bring its expert back for more testimony as a rebuttal witness. Judge Gonzalez ruled not, summarized in 4 FCC Rcd. at 2669-70 (¶¶16-21), and the Review Board affirmed, holding that in the hearing testimony under cross examination, the witness had addressed the full scope of the issue (except for a detail which was "absolutely immaterial") and there was no reason to allow a repeat appearance as a rebuttal witness. 4 FCC Rcd. at 2675, ¶39, 2671-75 (¶¶25-39). On further appeal, the Commission did not upset this ruling, while reversing the Review Board on other grounds not material here. 5 FCC Rcd. 7015 (1990).

5. Bennett Gilbert Gaines, 9 FCC Rcd. 533 (1994), opposition at 3-4, involved an issue regarding the accuracy of the testimony of a witness, Mr. Mangione, regarding the amount of

time that he had spent working at a radio station. In a comparative renewal hearing proceeding, Mr. Mangione was cross examined by an opposing party. That party produced a rebuttal witness who gave certain conflicting testimony. In the rebuttal phase, that party also sought to buttress its cross examination of Mr. Mangione by offering in evidence its pretrial deposition of Mr. Mangione. Judge Frysiak denied that unorthodox maneuver and was affirmed by the Commission, which nonetheless reopened the record on its own motion to add an issue in light of the deposition testimony.

Factual arguments

6. Adams proposes three items of rebuttal evidence, oral testimony by Mr. Bendetti and deposition testimony by RBI principals, Messrs. McCracken and Linton. The oral testimony by Mr. Bendetti is rebuttal of the direct case of RBI regarding its license renewal expectancy, as to which RBI had the burden of going forward with the evidence. Memorandum Opinion and Order by this Court released August 9, 1999 at ¶10. The deposition testimony of Mr. McCracken also is rebuttal of RBI's direct case defending its license renewal performance. The deposition testimony of Mr. Linton is rebuttal of testimony of Mr. Parker and of extended argument by RBI's counsel on the hearing record regarding the disputed matter of whether a "proxy contest" took place in the Fall of 1991, which became an issue by virtue of a bench ruling during RBI's direct case presentation.

7. Until the conclusion of that presentation, Adams had no

obligation to identify or tender its rebuttal evidence regarding the direct case (for which RBI had the burden of going forward with the evidence). The obligation of Adams was to tend to the business of introducing and defending its own direct case (for which Adams had the burden of going forward with the evidence). While at the same time its direct written case was exchanged and offered into evidence, Adams also exchanged and offered into evidence a study of composite week logs regarding RBI's license renewal expectancy, it did so recognizing that the document would be central to its rebuttal proofs and in introducing same into evidence, clearly identified it as rebuttal in nature. Tr. 323.³ By so doing, Adams did not waive its rights to present other rebuttal evidence in the ordinary and normal course.

8. It is manifestly clear that this must be so. While pretrial discovery provided advance knowledge for which pretrial discovery is intended, until Adams received and reviewed the written direct case of RBI, it was not in a position to gauge the overall nature of its rebuttal case material. When shortly thereafter, Adams filed its pretrial brief, it had not yet received rulings from the Court regarding the admission of RBI's direct case exhibits; nor had it then had the opportunity to cross examine witnesses in support of RBI's direct case. Accordingly, statements made in Adams' pretrial brief based on

³ No objection was made to that characterizaton of the evidentiary document.

the anticipated "totality of the record" cannot now be held to curtail or foreclose its rebuttal evidence rights, as RBI apparently would like to do. Opposition at 3. With these comments in mind, we address the factual arguments made by RBI.

9. Oral testimony by Mr. Bendetti. RBI argues, opposition at 2, that Adams lost its chance to present Mr. Bendetti as a witness, that it should have offered Mr. Bendetti's pretrial deposition in evidence or used this to prepare written testimony for him to sign, either way as a part of Adams' own direct case. This is nonsense. Mr. Bendetti's testimony has nothing to do with the direct case of Adams. Mr. Bendetti's testimony is exclusively in rebuttal of the direct case of RBI. The full metes and bounds of that direct case were not known at the time his pretrial deposition was taken, nor until the hearing sessions regarding same, including cross and redirect examination, were concluded. Thus, Mr. Bendetti's pretrial deposition preceded the evolution of the hearing record containing relevant facts and circumstances of which Mr. Bendetti has knowledge, the details of which Adams did not have the prescience to divine at the time it took his deposition. Moreover, even if Adams wanted to offer the deposition, Mr. Bendetti is not a director of RBI and his deposition is not admissible unless he has since become deceased or is unavailable for other reasons.

10. RBI, opposition at 2-3, argues that Mr. Bendetti cannot possibly rebut the testimony of Mr. Mattmiller regarding Mr. Parker's "mandate" that "upholding the station's obligation as a

public trustee in terms of providing service to the community" was "foremost of importance." Mr. Bendetti was a key employee in the program operation of the station by a small staff working in close quarters during the entire license term. He has personal knowledge of statements made by Mr. Parker, of statements made by Mr. Mattmiller, of statements made by other employees; Mr. Bendetti has personal knowledge of actions taken by Mr. Parker, by Mr. Mattmiller, by himself and by other employees in light of those statements including log entries confirming those actions. The weight and importance of his testimony has yet to be determined, of course. But it would be wrong to categorically exclude such evidence on the premise that it cannot possibly have any rebuttal effect on this highly self-serving direct case testimony of Mr. Mattmiller.

11. RBI, opposition at 2, argues that testimony by Mr. Bendetti regarding the circumstances of the use of canned programs by politicians produced in Harrisburg commencing in the latter part of the license term constitutes "new direct evidence" rather than rebuttal evidence. RBI does not define the phrase "new direct evidence" which it apparently has just coined. If RBI means, new "direct case evidence," that would have to do with the proofs regarding Adams and its principals. As has been indicated, Mr. Bendetti's testimony has nothing to do with the direct case of Adams; it has everything to do with the direct case of RBI. The rebuttal nature of the evidence is unquestionable: RBI's direct case is to the effect that such

canned programs were aired pursuant to its ascertainment process. Mr. Bendetti, whose role was central to that process, will testify that the programs were aired for reasons unrelated to the ascertainment process.

12. RBI, opposition at 2, applies its newly-coined "new direct case" label to the proposed testimony of Mr. Bendetti about circumstances for the airing of certain programs in excess of five minutes in length, for reasons unrelated to the ascertainment process, of which Mr. Bendetti was personally aware.

13. RBI, opposition at 2-3, makes the same erroneous argument about the proposed testimony of Mr. Bendetti, in rebuttal to the justification of failure to telecast live programming that was made in the direct case testimony of Mr. Kase on behalf of RBI.

14. And, RBI, opposition at 2, makes the same general argument, without any elaboration or specific discussion, about the complaints from the public regarding transmitter outages and operation at reduced power and the complaints from the public about programming during the license term. In so doing, RBI fails to mention, distinguish or discuss the case citations concerning the relevance of such complaints under the license renewal expectancy standard. RBI was content to remain silent regarding these relevant complaints in its direct case. RBI cannot now be allowed to block the introduction of such evidence on rebuttal.

15. Deposition testimony of Mr. McCracken. RBI, opposition at 3, argues that the testimony of this member of its board of directors doesn't rebut anything. To the contrary, this is evidence -- in our view eloquent evidence -- rebutting the obscene notion that a full power television station can earn a license renewal preference without a functioning studio to produce local programs throughout its entire license renewal term. Without prompting by any pending question, after an extended discourse on the nature of a half-hour local program which was begun after the end of the license term and when the station was under the pressure of a challenging application, Mr. McCracken volunteered the following:

I just want to say one last thing.

Q. (Mr. Bechtel) Go ahead, please.

A. And also it makes good sense. It's one of the kinds of things that we should be doing as a station.

16. Deposition testimony of Mr. Linton. RBI, opposition at 4, claims that this is not valid rebuttal because it is consistent with Mr. Parker's testimony. When the overall record is finally studied and briefed, it may well be that Mr. Parker's testimony supports our contention that a "proxy contest" within the parlance of Commission Section 310 policy took place. If so, then Mr. Linton's testimony corroborates and reinforces such a determination. But at this point in time, any such conclusion from Mr. Parker's testimony is strongly contested by RBI. Accordingly, Mr. Linton's deposition testimony is offered in rebuttal of the view of Mr. Parker's testimony, as argued by

counsel RBI, that no such "proxy contest" occurred. The issue is one of fact. Mr. Linton was a participant in and observer of the facts and his deposition testimony provides details of (a) Dr. Aurandt securing proxies for one shareholders' meeting electing a board of directors headed by himself, (b) Mr. Parker securing proxies for another shareholders' meeting electing a board of directors headed by himself, (c) Mr. Parker prevailing, (d) throwing out the old board of directors and (e) replacing same by the new board of directors from which Dr. Aurandt was excluded. Perhaps we are missing something, but it sure sounds like a proxy contest. Whether that conclusion is ultimately arrived at by the Court, the rebuttal nature and relevance of Mr. Linton's deposition testimony is clear.

Respectfully submitted,



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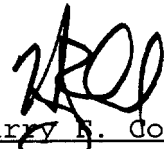
CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of February, 2000, I caused copies of the foregoing "Adams' Reply to Opposition to its Motion to Present Rebuttal Testimony" to be hand delivered (as indicated below), addressed to the following:

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